NO. 22434

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES JOHN BARKHORN, JR. Appellant vs. ADLIB ASSOCIATES, INC., a Nevada corporation Appellee	APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

BRIEF ON BEHALF OF APPELLEE ADLIB ASSOCIATES, INC.

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JURISDICTIONAL STATEMENT

The jurisdiction of the District Court was based upon Title 28 United States Code, Section 1332. The jurisdiction of this Court is found upon Title 28 United States Code, Sections 1291 and 1294.

In the Pretrial Order the following facts among others were admitted:

1. Plaintiff was a citizen of Hawaii;
2. The amount in controversy between the parties exceeds $10,000.00;
3. Defendant was a Nevada corporation.

Appellee's Motion to Dismiss Complaint (Record 16-18) for lack of diversity because its principal place of business was Hawaii (Record 16-26) was withdrawn and Appellee ordered to file a responsive pleading.

(Record 48-49).

Judgment for Appellee was entered November 11, 1963 (Record 206-207) and amended January 7, 1964 (Record 225). Notice of Appeal from the judgment as amended was filed January 10, 1964 (Record 226-227). This Court remanded for a determination of the issue of diversity jurisdiction (345 Fed.2d 173 (1965).) The parties stipulated that the complaint shall be deemed amended as to the first sentence of paragraph 1 thereof (Record 2) to read as follows:

> "Plaintiff is a citizen of the State of Hawaii; the defendant is a corporation organized and existing under laws of the State of Nevada, and on the filing date of this complaint was and is a citizen of the State of California by reason of the fact that its principal place of business on that date was and is at Santa Barbara, State of California."

The Trial Court found it had jurisdiction to enter its original decision on September 30, 1961 and reiterated and reaffirmed said original decision and entered judgment for Appellee on October 17, 1967 (Record 256-7) that Adlib on and after the filing date of the complaint herein had its principal office in Santa Barbara, California, and that it was a citizen of the State of California (Record 254).

Notice of Appeal from the judgment was filed October 23, 1967 (Record 258-259).

STATEMENT OF THE CASE

As important to making a complete State of the Case, Appellee supplements the Statement made in Appellant's Opening Brief (pp. 2-6) with the following:

The Facts as to Mr. Barkhorn's Knowledge that Surf Associates, Inc. Held a Lease at the Time the Option Was Signed on March 8, 1960, and that Appellee Was in a Position to Cause the Surf Lease to be Canceled at Any Time.

The Trial Court found:

> "Prior to the signing of the option agreement, plaintiff was informed orally that the lease to Surf Associates, Inc. was in existence but that defendant had the ability to cancel it at any time because Surf Associates, Inc. was in default in payment of rent thereunder and Elizabeth M. Smyth was the sole stockholder of both of said corporations, Theodore H. Smyth was the President and Elizabeth M. Smyth was the Vice-President of both of said corporations and they and their attorneys constituted the board of directors of both of said corporations." (Record LL. 2-12, p.201)

> "At all times material to this action, Elizabeth M. Smyth was the owner of all the stock of both corporations mentioned --namely, Adlib Associates, Inc., and Surf Associates, Inc. --, her husband, Theodore H. Smyth, was President, and she was Vice President of both of said corporations, and the directors of both corporations consisted of Mr. and Mrs. Smyth and their attorneys. The lease from defendant to Surf Associates, Inc., which was executed on July 1, 1959, and was still in effect on May 9, 1960, provided that defendant could cancel it if any rent thereunder was unpaid in excess of twenty days after it became due. The lease required Surf Associates, Inc. to pay rent thereunder to defendant quarterly in advance on the first day of January, April, July and October in each year during the continuance of the lease. At the time the option agreement was entered into, no rent had been paid under that lease and no rent thereunder was paid thereafter." (Record LL. 17-32, p.200, L. 1, p.201)

The Claim by the Architect

The Trial Court found:

> "On or after January 20, 1961, the architects hereinabove mentioned filed a Notice of Mechanic's and Materialmen's Lien against the land belonging to defendant for the fee hereinabove mentioned. This, of course, was long after the option had expired. Subsequently, defendant herein and others filed an action in the Circuit Court of the First Circuit of the State of Hawaii, against said architects. Seeking an order to vacate and cancel said Notice of Lien on the ground that the circumstances on which the fee was claimed did not come within Hawaii Statutes permitting Mechanic's Liens. (Our emphasis)
>
> "On April 10, 1963, that Court granted a motion by plaintiffs in that action for summary judgment and rendered judgment vacating and canceling of record said Notice of Lien on the ground alleged in the complaint therein. Said ruling of said Court is binding on the parties and this Court. Since plaintiff never exercised the option and therefore never put the defendant to the test of clearing up possible deficiencies in title, the question is really academic. Plaintiff never gave defendant an opportunity to clear up any question of title although aware of the possible claim sometime before the expiration of the option."

Dec. p.5, LL. 19-29, p.6, LL. 1-12, Record 203-204

The Fact that Mr. Barkhorn's Colony House Development Sales Were Not Sufficient During the Closing Days of the Option to Raise Funds Sufficient to Proceed Under the Option.

On the last day of the option period (extended from Sunday to Monday) May 9, 1960, Plaintiff gave Defendant a letter saying Plaintiff elected to cancel the project and demanded return of the $50,000.00 paid for the option because of the existing lease and the possibility of a suit by the architect. (Admitted Facts 8, Record 136, Ex. 1)

Appellant Barkhorn did not have the required $1,900,000 loan commitment or the requisite unit sales of $2,300,000 required before commencement of construction advertised for July 1, 1960. Under the unit

sales made, only $342,820 was due under the contracts at the time construction was scheduled to commence. (Ex. B - Chart)

By April 26, 1960, sales had stopped and no sales were made during the last twelve days of the option period. (Admitted Facts 17, Record 139, Ex. A - Chart)

The Trial Court found:

> "The Court is convinced from all the evidence including the testimony of plaintiff himself and other evidence and testimony stipulated to, although some facts testified to by other witnesses are not remembered or not admitted by plaintiff to be true, that plaintiff was fully aware of the situation, including the outstanding lease to Surf Associates, Inc., before the signing of the option, and found no fault with it until, faced with the prospect of losing his option from sheer inability to arrange for the necessary funds or credits within the option period, he suddenly without previous demand or warning to defendant, attempted to rescind as a last ditch expedient to try to retrieve his $50,000." (Dec. p. 5, LL. 16-18, Record 203)

SUMMARY OF ARGUMENT

A. The giving of an option for a lease neither implies nor "promises" covenants of title.

Appellant not only asserts that an option implies or "promises" covenants of title but that the option both implies and promises covenants of title retroactively as of the date of the option — regardless of date of exercise, if the option agreement, by its terms, provides that the lease shall commence "from and after and retroactively as of the date of the option." For these two contentions, Appellant fails to cite authority.

B. The optionor may contract to sell property he does not own. The only obligation of the optionor is to be able to convey clear title at the time the optionor is obligated to convey title. JOYCE v. SHAFER, infra.

C. Appellant fails to cite authority holding that an option for a lease, dated March 8, 1960, providing that if the option be exercised, the lease would, "be from and after and retroactive to March 8, 1960" obligates the optionor to make a conveyance and give covenants of title as of the date of the option.

D. The option provided that optionor may retain the $50,000 deposit if the option was not exercised. If the option was exercised, Appellee became obligated to draft and convey a 55-year lease to the optionee, which necessarily allowed Appellee a reasonable time in which to perform.

E. An optionee cannot reacind and recover the option deposit without first exercising the option when the optionor had a reasonable time in which to perform and there is no reason to believe the optionor will not be able to perform. SEEBURG v. EL ROYALE CORP., infra.

F. The instant situation was within the rule upheld by SEEBURG v. EL ROYALE CORP., infra, because there was no reason to believe Appellee could not perform and Appellee had a reasonable time in which to perform.

G. An optionee may rescind and recover the option deposit without exercising the option when it is obvious that the optionor cannot convey valid title and does not have a reasonable time in which to perform. BURKS v. DAVIES, infra.

H. The instant situation was not within the rule of Burks v. Davies because Appellee was entitled to a reasonable time in which to perform and there was no reason to believe Appellee could not perform.

I. Appellant demanded rescission on the last day of the option referring to the Surf lease of which he was aware before the option was signed and because of an architect's claim which was academic under the

issues involved.

J. Appellant never exercised the option. By the time Appellant had given notice of rescission and demanded return of the option money, (May 9, 1960), his sales had fallen off and he was not in a financial position to exercise the option. (Admitted Fact 17, Record 138-9)

POINT I

AN OPTION TO LEASE LAND DOES NOT IMPLY OR "PROMISE" COVENANTS OF TITLE AS FOUND IN LEASES.

PLAINTIFF FAILS TO CITE AUTHORITIES IN SUPPORT OF HIS POINT I THAT, "THE OPTION AGREEMENT 'PROMISES' THAT APPELLEE CAN GIVE A GOOD TITLE ON MARCH 8, 1960".

APPELLANT IN SUPPORT OF HIS CONTENTIONS MERELY DISCUSSES CASES HOLDING THAT LEASES IMPLY COVENANTS OF TITLE:- A PROPOSITION APPELLEE DOES NOT CHALLENGE.

The Trial Court concluded and cited these authorities:

> "A person may contract to sell land which he does not own. There is no implied covenant that he has a clear, or any, title at the time the contract is entered into, his only obligation is to be able to convey a clear tile at the time agreed upon for a conveyance."
>
> JOYCE v. SHAFER (1893) 97 Cal. 335, 32 Pac. 320
>
> See also: LUETTE v. BANK of ITALY, N.T. & S.A. (1930) 9th Cir., 42 Fed.2d 10
>
> (Dec. p. 3, 21-26, Record 201, LL. 21-26

Notwithstanding the Trial Court found there was no implied covenant or warranty of title during existence of the option agreement (Dec. p. 3, Record 201-202), Appellant, seeking to avoid the effect of the Trial Court

conclusion (and the law), attempts something novel by asserting as his Point I - "the option agreement 'promises' that Appellee can give a good covenant of title on March 8, 1960". Appellant fails to cite authority sustaining this assertion.

In the face of the foregoing conclusion by the Trial Court that as a matter of law an option does not imply covenants of title, Appellant asserts (without authority) that an option "promises" that the optionor gives a covenant of title retroactively as of the date of the option regardless of the day on which the option is exercised by optionee. Appellee submits that the foregoing conclusion and authority cited by the Trial Court completely determines that an option agreement neither implies nor "promises" the giving of a covenant of title retroactively as of the date of the option or at all.

Appellant makes no attempt to challenge the conclusions made by the Trial Court in its Decision that the only obligation of the optionor is to be able to convey clear title at the time agreed upon for the conveyance. (Record 201, LL. 24-25) and Joyce v. Shafer, supra; Luette v. Bank of Italy, N.T. &. S.A., supra, Dec. Footnote, Record 201).

Appellant cites McAlester v. Landers (1886) 70 Cal. 79, 11 Pac. 505, holding that the lessor broke his covenant of title as soon as he made it because part of the property had been previously leased to another. This holding is not challenged by Appellee. This case did not involve an option to give a lease but did involve a lease although the lessor had previously leased part of the premises to another. Of course at the time the second lease was conveyed there was an implied covenant of title which was broken because another lease had been previously given. McAlester v. Landers, supra, does not sustain Appellant's Point I that an "option agreement promises that the optionor can give a good covenant of title

retroactive to the date of the option agreement".

Appellee points out that making and delivery of a lease agreement does contain implied covenants among others, of title and quiet enjoyment. An option, not a lease, however, was before the Court. Appellant never exercised his option to take a lease.

On page 5, Appellant cites authorities holding that a lease agreement contains implied covenants of title and for quiet enjoyment. These are not challenged by Appellee. The question before the the Court, is the validity of Appellant's Proposition I that an option to lease contains covenants of title and quiet enjoyment. There is no need to consider Appellant's authorities cited by Appellant:- Le Hoy v. Kapoilani Estate, 26 Haw. 489 (1922); Rowle, Covenants of Title, 5th Ed., §253, p.439; 1 Tiffany, Landlord & Tenant, §239; or 51 C.J.S., Landlord & Tenant, §239, from which a quote is set forth on page 5.

The covenants of title are made at the time of the conveyance – at the time of the giving of the lease. A lease was not drafted or given herein because the option was not exercised by Appellant.

Appellant contends that because the option (Ex. 4, p.2) provided the lease term of 55 years, "shall be from and after and retroactive to March 8, 1960", that the lease therefor was to contain the usual covenants of title effective however as though made on March 8, 1960, regardless of the date on which the option was exercised. Appellant here misconceives commencement of the lease term relating back to the date of the option agreement as though in fact the conveyance was actually being made also on the date of the option for the lease and not on the later date during the option period on which the option was exercised. Appellant confuses the covenant implied in the lease as of the time of making the conveyance

therefor as going back retroactively to the date of the beginning of the lease term overlooking that the covenant of title is actually made or implied only when the conveyance of the lease is made and not prior thereto. Appellant overlooks that the 55-year lease called for, if the option was exercised, called for a reasonable time in which to draft the lease which would delay actual making of a covenant of title until some days after exercise of the option and when the 55-year lease had been drafted and the conveyance thereof actually made.

Provisions for relating the commencement date of lease back to dates fixed are not uncommon:

> "...the option vests in the grantee the right or privilege of acquiring an interest in the land, and, when accepted, entitles him to call for specific performance. Such right, when exercised must necessarily relate back to the time of giving the option so as to cut off intervening rights acquired with knowledge of existence of the option."
>
> SMITH v. BAGHAN (1909) 156 Cal. 359, 365, 104 P. 689

> "Such right (option) when exercised, must necessarily relate back to the time of giving the option (Peoples St. Ry. Co. v. Spencer, 156 Pa. St. 85, 27 Atl. 113) so far as to cut off intervening rights acquired with knowledge of existence of the option."
>
> SEEBURG v. EL ROYALE CORP. 54 CA 1-4

POINT II

WHEN THE OPTION IS NOT EXERCISED AN OPTIONOR WITHOUT TITLE CANNOT BE DEFAULTED AND REQUIRED TO RETURN THE OPTION MONEY WHEN THERE IS NO REASON TO BELIEVE OPTIONOR WILL BE UNABLE TO MAKE A VALID CONVEYANCE AND OPTIONOR HAS A REASONABLE TIME IN WHICH TO PERFORM.

(SEEBURG v. EL ROYALE CORP, infra)

WITHOUT OPTIONEE FIRST EXERCISING THE OPTION AN OPTIONOR WITHOUT TITLE CAN BE DEFAULTED AND REQUIRED TO RE-

TURN THE OPTION MONEY WHEN IT IS IMPOSSIBLE FOR OPTIONOR TO CONVEY TITLE WITHIN THE OPTION PERIOD. (BURKS v. DAVIES, infra)

BECAUSE THERE WAS NO REASON TO BELIEVE APPELLEE COULD NOT PERFORM IN THE REASONABLE TIME AVAILABLE (SEE-BURG v. EL ROYALE CORP, infra), APPELLANT'S CONTENTION THAT APPELLEE WAS IN DEFAULT ALTHOUGH APPELLANT HAD NOT EXERCISED HIS OPTION IS PLAINLY ERRONEOUS.

In Seeburg v. El Royale Corp., defendant vendor gave plaintiff-optionee a 30-day option to buy an apartment house for which the optionee paid $5,000. To exercise the option, optionee was required to give written notice and deposit $25,000 in escrow. Each party had 30 days, after notice, to perform their respective obligations. During the option, optionor was made subject to a restraining order from selling the property which was effective for the remaining period and later. Optionee demanded return of the $5,000 and brought a rescission action to recover. The court held that an optionee, who has not tendered performance as required to exercise the option, cannot demand return of option money because the optionor was temporarily stopped by an injunction and the optionor had 30 days in which to perform after notice and there was nothing to show that if optionee had exercised the option, the optionor could not have performed.

In Burks v. Davies, optionor gave plaintiff-optionee an option on August 8 to September 1 to purchase an undivided one-third of certain lands and accepted $1,000 for the option. Optionor knew there were five acres he did not own but did not inform optionee of this fact. Prior to expiration of the option, optionee learned optionor did not have title to

5 acres and rescinded the option demanding repayment of the $5,000. Optionor made no effort to secure title until he received notice of rescission. Optionor was given an extra 24 hours after notice and did not obtain title but obtained an option subject to another option. The court held that without making a tender or exercising the option the optionee was entitled to rescind and obtain return of his deposit money when optionor does not have title and cannot obtain title within the option period.

On page 14 of his Brief, Appellant recognizes the two rules:- the rule denying recovery of option money without exercise of the option where there is no reason to believe optionor could not perform, as held in Seeburg v. El Royale Corp., 54 CA2d 1, 128 P.2d 362 (1942), in which optionor had 30 days sfter notice to comply with the option; and the rule followed in Burks v. Davies, 85 Cal. 110, 24 Pac. 613 (1890), in which performance by optionor was impossible and wherein recovery of option money was allowed without Optionee being first required to exercise the option.

Appellant says the Burks case may be distinguished from the Seeburg case because in the Seeburg case, the optionor was allowed 30 days to perform (App. Br. p. 14). This was not the only fact distinguishing the Seeburg case from the Burks case. In the Seeburg case, there was no reason to believe the optionor could not convey title; in theBurks case, there was no reason to believe the optionor could convey title; performance was impossible.

It is not correct, as Appellant says in the last paragraph on page15 of his Brief, that in the Burks case, the optionor obtained on the last day an offer of sale from the true owner of 5 acres to correct the deficiency.

In the Burks case, rescission and restitution of option money was allowed without exercise of the option because performance by optionor

was impossible. Optionor did not have and could not acquire title to a 5-acre parcel. On the last day of the option extended 24 hours, optionor was able to acquire only an option to buy the 5-acre parcel and that option was subject to a prior option. (Opin. pars. 4, 9, 10)

> "...defendant never did succeed in getting title to the property held by Smith, and could not have conveyed it before expiration of the time given for exercise of the option." Opin. par. 9

The Burks case held that although optionor need not hold title at all times during the option period, the optionor must have title at the time the optionor becomes obligated to convey. Opin. par. 6

The Burks case held: that the optionee may rescind and have restitution of the option money paid for the option upon learning that there is no possibility that optionor can perform; and that in the situation in which performance is not possible, equity does not require the idle act of notice or exercise of the option which cannot be performed.

The Burks case did not hold: that for an option to be valid, optionor must hold title to the land optioned; that the optionor can be placed in default without exercise of the option - in the absence of the usual grounds of fraud, failure of title etc., giving right to rescission of the option contract; or that the optionor must hold title at all times during the option period; that in all instances, the optionor is not entitled to a reasonable time in which to perform; and that the power to obtain and convey title at the time performance becomes due is not sufficient against a demand for rescission. Opin. par. 6.

Upon exercise of the option, this performance was required by Adlib:- to cancel the Surf lease; and prepare, execute, sign and deliver (with possession) the lease, dated retroactively as of March 8, 1960 - the option date.

In the absence of being excused from exercising the option in those situations in which performance by the optionor is impossible (Burks v. Davies) the optionor cannot be placed in default without exercise of the option because it is only upon exercise of the option that optionor becomes obligated to make a conveyance and it is only when time for performance arrives, can it be determined that optionor can or cannot perform in the absence of a situation in which performance is obviously impossible. (Burks v. Davies, supra)

The Trial Court found that the instant situation was not within Burks v. Davies, supra, and was within Seeburg v. El Royale Corp., supra; and that the only obligation of Appellee Adlib was - "to convey title at the time agreed upon for a conveyance", citing Joyce v. Shafer (1893) 97 Cal. 335, 32 Pac. 320; Luette v. Bank of Italy (1930) 9th Cir., 42 F.2d 10; (Dec. p. 3, Record 201) and that there was no evidence of inability of Appellee to convey clear title at any time within the option period. (Dec. p. 4, LL. 14-17, Rec. 202)

Burks v. Davies does not apply to the instant facts because - as found by the Trial Court – Adlib could give a lease with a clear title at any time during the option. (Dec. Record 201) Exercise of the option by Barkhorn was therefore not excused.

> "It necessarily follows that, unless plaintiff exercised the option and defendant was unable at that time to execute a valid and clear lease, defendant would not be in default under the option agreement. As has been pointed out, plaintiff did not exercise the option."
> Dec. p. 3, LL. 27-32, Record 201.

Appellant seeks to escape the rule in Joyce v. Shafer, supra, quoted above and on page 12 of Appellant's Brief by alleging "there was a clearly expressed covenant that Appellee could give a lease beginning the very day the option was executed" (App. Br. p. 13). Appellant then goes on to say

"The reason for this distinction is succinctly stated at 55 Am. Jur., Vendor & Purchaser, 344". What the "distinction" is Appellant fails to define.

It is obvious that the quote from American Jurisprudence does not sustain Appellant's assertion that Appellee expressed a covenant that Appellee could give a lease retroactively beginning in fact on the date of the option.

The quote from American Jurisprudence on page 13 of Appellant's Brief is taken from Burks v. Davies. An examination of the quote in American Jurisprudence shows that Burks v. Davies is the only case cited as authority therein.

The quote give by Appellant from 55 Am. Jur., Vendor & Purchaser, §44, on pages 13 and 14 of his Brief does not state the rule completely. We think Appellant should have quoted also, the next sentence taken from American Jurisprudence reading:

> "Where the purchaser knew at the time the option was given that the vendor held under a bond for title only, and the option provided for the giving of a deed conveying a good title after the option had been exercised and a certain amount had been paid to convert the option into a binding contract, he cannot claim that the want of title in the vendor constituted a breach of the option without making the payments required by the option."
>
> 55 Am. Jur., Vendor & Purchaser, §44 in part immediately following quote in App. Op. Br. p. 13.

POINT III

ADMISSION OF EVIDENCE THAT APPELLANT BARKHORN, PRIOR TO MAKING THE OPTION, WAS INFORMED OF THE OUTSTANDING SURF LEASE DID NOT VIOLATE THE PAROL EVIDENCE RULE.

THERE WERE NO COVENANTS OF TITLE (POINTS I and II, supra) TO VIOLATE AND THE EVIDENCE WAS NOT OFFERED TO VARY AND THE EVIDENCE ADMITTED DID NOT VARY TERMS, BUT TO SHOW THE INEQUITABLE POSITION OF APPELLANT BECAUSE HE KNEW OF THE SURF LEASE PRIOR TO TAKING THE OPTION.

Again Appellant fails to offer authority supporting his contention that an option "promises" covenant of title retroactively effective as of the date of the option regardless of the date on which the option is exercised. This contention is substantially a repetition of Appellant's preceding Points I and II.

Appellant fails to point out that the evidence admitted did in fact vary any option terms.

Appellant cites authorities all to the effect that surrounding facts etc., cannot be used to contradict etc., or vary the meaning or legal effect of an instrument. (App. Br. pp. 20-21) Appellee does not challenge these authorities or the parol evidence rule as stated by Appellant. The parol evidence rule is not applicable because the evidence offered was not used or intended to be used in any way to modify the plain meaning of any provision of the option agreement.

The Trial Court found there were no covenants or warranties of title arising from the option or during the existence of the option agreement.

> "Plaintiff objects to evidence as to information given him orally by persons acting in behalf of defendant, on the ground that it contradicts the claim "implied warranty of title'. The Court has ruled that there was no 'implied warranty of title' during the existence of the option agreement. Therefore, such testimony, if material, could not be excluded by the parol evidence rule."
>
> Dec., Record 202

The parol evidence rule cannot come into operation as to covenants which did not exist, which had not yet come into existence by exercise of the option for the lease and which would come in to existence only at the time that the lease was conveyed.

The evidence offered does not violate the parol evidence rule because it does not and was not offered to contradict, vary or modify the option agreement or any covenant of title implied therein. The parol evidence rule does not apply.

POINT IV

THE OPTION AGREEMENT DID NOT IMPLY OR "PROMISE" A COVENANT OF TITLE AS HAVING BEEN MADE RETROACTIVELY ON THE DATE OF THE OPTION - MARCH 8, 1960. THEREFORE, APPELLANT DID NOT HOLD A COVENANT OF TITLE WHICH COULD BE VIOLATED BY THE SURF LEASE OR BY THE ARCHITECT'S CLAIM (Presuming but not conceding the claim was an encumbrance).

As his Point IV, Appellant again claims Appellee made a covenant of title as of March 8, 1960, the option date, because, "...lease would be from and after and retroactive to March 8, 1960". (App. Br. p. 32) In each of his preceding Points I, II and III Appellant has grounded his contentions upon the same assertion that Appellee made a covenant of title or promised a covenant of title as of March 8, 1960, the date of the option agreement.

Appellant's contention:- "Point IV. The Encumbrances on the Property Constitute a Breach of Covenant" cannot be sustained for the same

reason Appellant's Points I, II and III cannot be sustained:- there were no covenants of title implied or promised by the option as established by Appellee's preceding Points I, II and III.

The error by Appellant appears in the sentence reading:- "The covenant of title would be that the appellee has sufficient title to give a lease on that day" (App. Br. p. 22), referring to March 8, 1960. Again Appellant presumes erroneously that Appellant would be obligated to retroactively go back and with magic make conveyance along with covenants of title on March 8, 1960. Why this is not true has heretofore been discussed under Points I and II, supra.

The Surf lease could not have been an obstacle. The lease from Adlib Associates, Inc. to Surf Associates, Inc. was made in connection with a plan to develop the land owned by Adlib Associates, Inc. by erecting thereon a cooperative apartment building to be known as Waikiki Manor (Record 137). Surf did not pay any rent (Pretrial Order, Admitted Fact 11, Record 137). In result, the lease was in default on July 21, 1959 because rent was payable on the first day of January, April, July and October (Ex. 7, p. 34). The lease provided the lessee was in default if rent was not paid within 20 days (Ex. 7, p. 13). The Waikiki project was abandoned in December 1959. Construction of a building had not been commenced (Ex. 8-A; Pretrial Order Admitted Fact 15, Record 138). After Appellant signed the option, Appellant used the property as a base for Appellant's operations in his selling effort in connection with his proposed Colony House development of the premises.

Appellant had no legal basis for trying to use the architect's claim as justification for "rescission" because a mechanic's lien, if one had been

filed prior to execution of the lease, would not have prevented execution of the lease. The only effect of the filing of the claim would have been to require Appellee as lessor to take care of the matter.

Furthermore, the architect's claim was not made the subject of mechanic's lien until January 20, 1961; the lease to Appellant would have been prepared, executed and delivered at the latest shortly after May 9, 1960 which was the last day on which Appellant could have exercised the option. Hence, the architect's claim would have absolutely no effect on the execution of the lease to Appellant.

The evidence shows that if Appellant had exercised the option, Appellee could have performed the option and could have done so promptly. Appellee could have eliminated the lease outstanding at the same meeting of the Board of Directors at which execution of the lease to Appellant would be authorized.

The Trial Court found:

> "Since plaintiff never exercised the option and therefore never put defendant to the test of clearing up possible deficiencies in title, the question is really academic. Plaintiff never gave defendant an opportunity to clear up any question of title, although aware of a possible claim sometime before the expiration date of the option."
> (Dec. p. 6, LL. 6-9, Record 204)

Appellee does not deem a discussion as to Appellant's remarks about fraud as necessary other than to point out that Appellant's discussion is based on surmises resting on suppositions not within issues pled or tried and a topic raised for the first time on appeal.

POINT V

APPELLANT IS NOT IN AN EQUITABLE POSITION WHICH PERMITS EXERCISE OF THE EQUITABLE REMEDY OF RESCISSION.

The following facts reveal reasons Appellant made a last ditch effort on May 9, 1960 to "rescind" the 60-day option agreement dated March 8, 1960 which terminated by its terms on May 8, 1960 and of which Appellant had enjoyed the full benefits for the full 60 days.

> The basis building requirement was $4,200,000; a $1,900,000 loan commitment was required; there was no loan commitment; Appellant did not have a loan commitment; before construction could even commence $2,300,000 in cash by down payments from sales of units to investors was needed; by the end of the option period there was cash in hand of only the sum of $39,650 and only $342,840 promised in the agreements obtained in result of the sales efforts made by Appellant which would have become due at the time of the advertised commencement of construction; the total value of sales was only $1,663,150 against a required $2,300,000.
>
> Summarized from: Pretrial Order, Admitted Facts 16, 17 18
>
> Record 138,139; For graphic illustration of above facts see Exs. A, B and C - Charts

At the close of the option period, Appellant did not have sufficient sales or a loan commitment permitting him to proceed with the project and Appellant wanted out. Having failed of the opportunity purchased, Appellant seeks to take back the $50,000 (Pretrial Order, Admitted Facts 16, 17, 18; Record 138, 139). Appellant was not able to exercise the option.

The Court found:

> "Furthermore, if this action be considered as equitable or quasi-equitable as well as legal, the Court finds no such equities in favor of Plaintiff as would warrant a judgment permitting recovery by him in this action." (Record 204, Dec. p. 6, LL. 23-28)
>
> "It is a general rule...in courts of equity, that if a party is free from duress...and is the winner of his right to rescind, he must do so promptly. Delay may result in a Court's denying the right to rescind."

12 Cal. Jur. 2d 412 citing

FRANKISH v. FED. MORTGAGE CO., 30 C.A.2d 700, 87 P.2d 90

SANDERS v. MAGILL, 9 Cal.2d 145, 70 P.2d 159

"The party seeking to rescind a contract must act with due diligence."

§194, 12 Cal. Jur. 2d 412.

CONCLUSIONS

The option agreement provides that Appellee shall keep the $50,000 deposit if Appellant fails to exercise the option. Having enjoyed the benefits of the option for the full 60 days by testing the market for his cooperative apartments, Appellant on the last day - the 61st day because Sunday was the 60th, attempts to rescind and demands return of his deposit excusing himself from exercising the option by complaining of the existing Surf lease and a possible claim by an architect. Appellant knew of the Surf lease before signing the option and of the architect claim by March 28, 1960, and neither complained or did anything about them until mentioned in his notice of rescission given on May 9, 1960.

To excuse his failure to exercise the option Appellant offered the novel thesis supported by no authority that Appellee by giving the option, implied or promised a covenant of title retroactively as of March 8 the option date. This contended innovation in the law made by Appellant is the basis of each and all the four Points set forth in Appellant's Brief.

Appellant contends in his Point I that the option agreement "promises" a covenant of title on March 8; in Point II because of the aforesaid covenant on March 8 there was violation on March 8; in Point III, that because

of the covenant claimed, it was violated by parol evidence; and in his Point IV that the covenant was violated by the Surf lease and the architest's claim. Thus Appellant's new claim as to covenants is the basis of all his four Points.

The Trial Court found that an option does not imply covenants of title. (Joyce v. Shafer) Appellant fails to challenge this authority.

To excuse his failure to exercise the option Appellant cites Burks v. Davies, supra. The Trial Court found that there was no evidence that Appellee was not able to perform if the option had been exercised. The instant situation was within the rule of Seeburg v. El Royale Corp., supra and not within Burks v. Davies. Appellant failed to show a valid ground for not exercising the option.

The facts admitted and the conclusions by the Trial Court showed that Appellant was not able financially to exercise the option.

The Trial Court also found that Appellant was not in an equitable position in which to demand rescission complaining of items he knew about before the option was signed on March 8, 1960 and not having complained about them until his complaint on the extra last day in a "last-ditch" effort to get back his deposit for an option he used for his purposes but could not financially exercise.

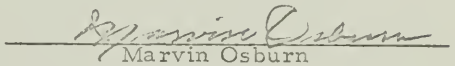
Appellee has quoted extensively from findings by the Trial Court because Appellant's Brief appears to Appellee to ignore these findings as to facts established and to re-argue the case de novo as though there was no judgment.

Appellant has not shown any errors in the Trial Court Decision.

For above reasons, Appellee submits that the judgment by the Trial Court should be affirmed.

RESPECTFULLY SUBMITTED,

January 10, 1969.



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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Marvin Osburn

CERTIFICATE OF SERVICE

I hereby certify that service of the Brief on Behalf of Appellee Adlib Associates, Inc. in the within action was made upon:

MR. FRANK D. FADGETT
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attorney for Appellant, on January 16, 1969, by mailing three (3) copies thereof to his office as shown above.

Dated: Los Angeles, California, January 16, 1969.

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